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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Curtiss-Wright Corporation. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses and professional organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases recently decided in this Court: *District of Columbia v. The Greater Washington Board of Trade*, —— U.S. ——, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, —— U.S. ——, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to retroactive liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for the past 19 years.

We believe this Court's review is urgently needed. Without being overly dramatic, we wish to make the Court aware that, in terms of the number of plans affected and the magnitude of the impact—not just on employers but also on the federal judiciary—this case dwarfs any of the ERISA cases that this Court has previously chosen to decide.

Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants—here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3)—give rise to a substantive remedy—here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the Chamber as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The questions presented are exceptionally important because they affect most employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). The plan provision held by the decision below to be insufficient under ERISA is a standard provision conventionally included in most employee benefit

plans. If that provision really is insufficient under ERISA, most of the single-employer benefit plans in the United States—of which there are over 5 million—are affected.

The questions presented are also exceptionally important because of how seriously they affect employee benefit plans. The decision below invalidates the standard plan provision reserving to the employer the authority to amend the plan and voids all amendments previously adopted under that provision. As such, it voids all amendments to most employee benefit plans as far back as the statute of limitations reaches (potentially back to 1975), thus throwing into doubt the terms of all affected plans, not only today but for the past 19 years.

If not reversed, the decision below will mean untold harm to employers, employees and the federal judiciary. For example, repeated amendments have been required over the years to maintain qualified pension and profit sharing plans in compliance with the ever-changing rules of section 401(a) of the Internal Revenue Code. If those amendments are void, the plans are retroactively disqualified, causing employers to lose deductions for contributions, employees to incur income tax on their vested interests under the plan, and the pension trust to become a taxable entity which owes back taxes.

For another example, in the area of health care, employers have made repeated and significant amendments to their plans in recent years in order to contain costs, by introducing employee contributions, deductibles, co-pays, etc. For retirees, plan amendments have drastically reduced, or even eliminated, health coverage in response to recent accounting rule changes. If all of those amendments are void, massive class actions will be mounted to force the plans to re-pay all of those amounts to the participants—completely upsetting the trade-off between pay and benefits and frustrating the employer's attempt to control the cost of health care.

Worst of all, since a fiduciary has a federal statutory duty under ERISA not to enforce any term of the plan that contravenes ERISA, the plan administrator of every affected plan will be in doubt as to what the terms of the plan are (and have been since ERISA). Faced with personal liability for any misstep (on the ground of breach of fiduciary duty), every plan administrator's only intelligent course will be to seek instructions in federal court by means of a declaratory judgment action against the defendant class of participants, in which the court will review all amendments made to the plan over the past 19 years in order to decide what the terms of the plan have been at every point during that period. Congress could never have intended such an extravagant waste of private and judicial resources, which, in the ultimate irony, will only mean less money available for employee benefits.

ARGUMENT

THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT BECAUSE THE ANSWER GIVEN BELOW THROWS INTO DOUBT THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, VISITING ENORMOUS UNINTENDED COSTS ON EMPLOYERS AND BURDENING THE FEDERAL COURTS WITH A NEW CLASS OF ERISA LITIGATION.

A. The Questions Presented Affect Most Single-Employer Benefit Plans Covered by ERISA.

The questions presented affect most single-employer benefit plans covered by ERISA. The reason is that the language held invalid by the decision below is the conventional language used routinely by drafters of employee benefit plans. As a result, the overwhelming majority of plans contain language in substance identical to that held invalid by the decision below. Few contain language that assuredly survives that decision.

The conventional language originated long before ERISA. From the beginning of employee benefit plans,

good drafters have expressly reserved to the employer the right to amend the plan at any time. This has always been considered necessary under the common law of trusts, which holds that a trust generally cannot be amended unless such authority is expressly reserved in the trust instrument.[1] Under the common law of trusts, it was sufficient simply to recite, "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan"—the very language at issue in this case. 4a.

Borrowing from the common law of trusts, ERISA established a statutory requirement that amendment be addressed in the plan document:

> Every employee benefit plan shall—
>
> . . .
>
> (3) provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan.

ERISA sec. 402(b), 29 U.S.C. § 1102(b).

Notably, ERISA did *not* require that the person with authority to amend be identified *in the plan*; it required no more than a "procedure . . . for identifying the persons who have authority to amend." Most practitioners concluded that the conventional reservation of authority to amend *exceeded* the statutory requirement—by actually identifying that person in the plan. They were confirmed in this view by the knowledge that (i) the intent of ERISA was to carry forward the common law of trusts

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[1] IV W. Fratcher, *Scott on Trusts* (1980) § 331 at 378-379; G. Bogert, *The Law of Trusts and Trustees* (2d ed. 1983), Ch. 47, § 992 at 218-219; *Restatement (Second) of Trusts* § 331. This flows from the unilateral nature of a trust and stands in contrast to the law of contracts, under which the parties can amend by mutual consent and need not reserve such authority in the original contract. 1A A. Corbin, *Corbin on Contracts* (1963) § 186; Restatement (Second) of Contracts (1979) § 89(a); Uniform Commercial Code § 2-209(1).

(as this Court has expressly confirmed on more than one occasion)[2], and (ii) the conventional language was entirely sufficient under the common law of trusts.

The text of ERISA itself provided the ultimate confirmation. By repeatedly imposing duties upon "the employer," with no references to officers or boards of directors or any other individual who might act on behalf of the employer, Congress conclusively demonstrated its intent that "the employer" was sufficient identification of the person with legal responsibility under ERISA.[3]

Thus was the conventional reservation of authority to amend perpetuated in practice after ERISA for most pension and welfare plans.[4] The petition contains an illustrative list of specimen benefit plans published in a wide variety of sources that contain the conventional language. The Chamber adds this affirmation from the experience of its members.

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[2] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, —— U.S. ——, 113 S. Ct. 2264, 2276 (1993) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332 (1981)); *Mertens v. Hewitt Associates*, —— U.S. ——, 113 S. Ct. 2063, 2068, 124 L.Ed.2d 161, 170 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985); *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

[3] One obvious virtue of saying "the employer" is that it automatically accommodates employers of every different type—sole proprietorships, partnerships, and corporations, for example. How each of these acts is a matter of the law of the state with authority over their activities. Trying to spell out in an employee benefit plan exactly how the sponsoring entity acts runs a risk of conflicting with state law and generating unnecessary and unwelcome questions of ERISA pre-emption.

[4] The same is true of multiemployer plans, but the conventional language in multiemployer plans was always somewhat more detailed, consistent with their governance by a joint board of trustees —half appointed by the unions and half appointed by the employers. The decision below recites that it does not disturb the conventional language in multiemployer plans.

The universe of single-employer pension and welfare plans covered by ERISA is large indeed. It comprises both pension plans (pension, profit sharing, 401(k), ESOP, etc.) and welfare plans (medical, life insurance, disability, severance, etc.). According to a recent tabulation by the U. S. Department of Labor, there were 873,000 single-employer pension plans covered by ERISA in 1987. In addition, in 1987, there were an estimated 4,500,000 welfare plans covered by ERISA.[5]

Until the decision below, no employer or drafter had any reason to doubt the sufficiency of the conventional language, which had survived almost 20 years of ERISA litigation, not only without being invalidated, but without even being *challenged*, as far as we can determine. For example, reduction or elimination of retiree medical insurance has been one of the most hotly contested areas of recent years. In almost every case where the amendment language is reported, it is in substance identical to the amendment language in this case, but not once has the sufficiency of that language even been challenged.[6]

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[5] M. Brossman and K. Kamen, *Employee Benefit Issues 1993* at 386 (International Foundation of Employee Benefit Plans, 1993). Figures for pension plans come from the annual reports that plans are required to file with the Department of Labor. Since many small welfare plans are exempt from filing the annual report, the figure for welfare plans is an estimate by the Department of Labor.

[6] *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, —— U.S. ——, 114 S. Ct. 196 (1993); *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993); *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 2992 (1993); *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989);

B. The Decision Below Throws Into Doubt the Terms of All Affected Plans.

Very simply, the decision below holds that the conventional language, reserving the authority to amend the plan to the employer, is insufficient as a matter of law under ERISA; as a result, according to the decision below, amendments adopted thereunder are void. Thus, the practical effect of an affirmative answer to the questions presented is to *void all amendments to most single-employer benefit plans since the enactment of ERISA*. This is a classic example of the cure being worse than the disease.

Employee benefit plans undergo regular and, in many cases, constant change. These changes are effected by plan amendment. They serve a variety of purposes, such as (i) updating the plan to comply with changes in the law and regulations, (ii) re-arranging benefits to better meet the needs of employees, (iii) improving or reducing benefits in accordance with the employer's ability to pay, and (iv) conforming the plan to changes in the employer's situation, including acquisitions and divestitures. Aside from a relative handful of brand new plans, it is doubtful that there is any single-employer benefit plan covered by ERISA—whether pension or welfare—that has not been amended repeatedly since ERISA.

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986); *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994); *In re Unisys Corp. Retiree Benefits Litigation*, 837 F. Supp. 670 (E.D. Pa. 1993); *United Steelworkers v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862 (D.R.I. 1993); *Benedict v. United Inter-Mountain Telephone Co.*, 820 F. Supp. 354 (E.D. Tenn. 1993); *Joyce v. Curtiss-Wright Corp.*, 810 F. Supp. 67 (W.D. N.Y. 1992); *Chervin v. Sulzer Bingham Pumps, Inc.*, 13 EBC 1089 (D. Or. 1990); *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986).

For example, in the 19 years since enactment of ERISA in 1974, Congress has changed the law applicable to pension and profit sharing plans that are intended to qualify under section 401(a) of the Internal Revenue Code at least a dozen times, not to mention constant changes in regulations.[7] In response, employers have regularly exercised their authority to amend, under the conventional reservation language of their plans, to keep the plans in compliance with section 401(a). If those amendments are void, virtually every qualified pension and profit sharing plan has been disqualified.

For another example, the vast majority of medical plans for active employees have been amended in recent years in order to implement cost containment features, such as employee contributions, deductibles, co-pays, preferred provider organizations, etc.[8] It is generally understood that such amendments have been instrumental in holding down the cost of medical plans (at least by slowing the rate of increase in cost) and, therefore, keeping

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[7] *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, P. L. 103-66; Unemployment Compensation Amendments of 1992, P. L. 102-318; Omnibus Budget Reconciliation Act of 1989, P. L. 101-239; Technical and Miscellaneous Revenue Act of 1988, P. L. 100-647; Omnibus Budget Reconciliation Act of 1987, P. L. 100-203; Tax Reform Act of 1986, P. L. 99-514; Retirement Equity Act of 1984, P. L. 98-397; Tax Reform Act of 1984, P. L. 98-369; Tax Equity and Fiscal Responsibility Act of 1982, P. L. 97-248; Economic Recovery Tax Act of 1981, P. L. 97-34; Miscellaneous Revenue Act of 1980, P. L. 96-605; Revenue Act of 1978, P. L. 95-600; Tax Reform Act of 1976, P. L. 94-455.

[8] Between 1979 and 1991, the percentage of participants who were required to contribute toward the cost of health care for themselves under ERISA-covered plans nearly doubled—to 51%—and the amount of the employee contribution was raised by 2½ times. Likewise, in 1980, only 3% of participants in medium and large establishments were enrolled in managed care programs; in 1991, 33% were enrolled in managed care programs. Just from 1986 to 1991, the percentage of participants subject to hospital pre-admission certification rose from 16% to 63%. U.S. Department of Labor, *Monthly Labor Review* at 9 (March 1994).

medical plans affordable for employers and employees alike. Under the decision below, however, all of those amendments are void.

There have also been major amendments to medical plans for retirees. According to a recent survey, two thirds of companies made changes in their retiree medical plans in 1991 or 1992, principally because of Statement of Financial Accounting Standards No. 106, adopted in December 1990. Approximately one third of employers surveyed amended their plans to increase the retiree contribution toward medical coverage. Sixteen percent increased deductibles or out-of-pocket maximums. Ten percent changed eligibility standards.[9] Under the decision below, however, those amendments are void.

The impact of the questions presented would not be so broad and serious if the decision below were limited to prospective effect, but it applies retroactively as well. The extent of the retroactive effect depends on the statute of limitations. At a minimum, the decision below voids amendments adopted within the period of the most analogous state statute of limitations, likely a period of at least several years. Employees will undoubtedly argue, however, that the decision below voids all amendments adopted since the effective date of ERISA section 402(b)—January 1, 1975 [10]—on the theory that the plan administrator has a fiduciary duty to apply the terms of the plan as they exist under law, without regard to any invalid amendments, no matter when they occurred.[11]

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[9] *Retiree Medical Benefits: Who Are the 1992 Wyatt COMPARE Employers?*, reported at 20 *Pension & Benefits Reporter* (BNA) 1079-1080 (May 17, 1993).

[10] ERISA sec. 414(a), 29 U.S.C. § 1114(a).

[11] This principle is analogous to the principle of the common law of trusts that a fiduciary generally may not invoke the statute of limitations against a beneficiary. 1 C. Corman, *Limitations on*

The fiduciary duty of the plan administrator adds a dimension that the decision below did not take into account. There is no doubt that the plan administrator under ERISA exercises fiduciary responsibility in interpreting and applying the plan. 29 C.F.R. § 2509.75-8.[12] Under ERISA, as a fiduciary, the plan administrator is bound to adhere to the terms of the plan *but only insofar as those terms are consistent with ERISA*:

> [A] fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

ERISA sec. 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).[13]

The decision below holds, as a matter of law under ERISA, that plan amendments adopted pursuant to the conventional reservation of authority to amend are *not* consistent with ERISA. ERISA section 404(a)(1)(D) therefore forbids the plan administrator to give them effect.[14] If the decision below stands, therefore, the plan

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Actions (1991) § 9.10; *Restatement (Second) of Trusts* § 219, comments a, c; 2 H. Wood, *Limitation of Actions* (4th Ed. 1916) § 200.

[12] The individual, committee or other entity with authority to interpret and apply the terms of the plan to grant or deny claims for benefits may have a variety of different titles in different plans—"claims administrator," "benefits committee," "trustee," "named fiduciary," etc. In this brief, we adopt the terminology of the cited regulation of the Department of Labor and refer to that fiduciary generically as the "plan administrator."

[13] "This title" refers to Title I of ERISA, including section 402(b)(3) which is at issue in this case.

[14] The decision below expresses the hope that it can be limited to only those amendments which are challenged by participants, presumably only those which adversely affect participants. 11a, n. 5. That hope is vain; as a fiduciary under ERISA, the plan

administrator of each affected plan has a fiduciary duty to reconstruct the terms of the plan ignoring all such amendments. As a rseult, the decision below throws into doubt the terms of most single-employer benefit plans covered by ERISA, both pension and welfare.

C. The Decision Below Contradicts the Purpose of ERISA by Imposing Upon Employers Significant Costs Not Intended by Congress and Will Burden the Federal Courts With a New, Entirely Unnecessary Class of ERISA Litigation.

Calling into question, and perhaps voiding, virtually all amendments adopted since ERISA will have a variety of serious, adverse consequences wholly unintended by Congress in ERISA and will work directly contrary to the intent of Congress in ERISA to promote and encourage employee benefit plans. It will also create a new class of ERISA litigation in the federal courts, with the lawsuits brought by the fiduciaries if not by the participants.

1. Disqualification of a pension or profit sharing plan under section 401(a) of the Internal Revenue Code means that (i) the employer loses the deductions that it took under section 404 of the Internal Revenue Code for contributions to the plan, (ii) the employees must pay federal income tax on the value of their vested interests in the plan (though they receive no money with which to pay the taxes), (iii) the trust becomes a taxable entity and owes federal income tax on its earnings, and (iv) distributions from the plan to employees do not qualify for special tax treatment such as rollover to an individual

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administrator has a spontaneous, federal statutory duty to determine what the terms of the plan are and then to carry them out, regardless of whether anyone has challenged them. As a fiduciary, the plan administrator simply is not permitted to give effect to plan terms that are unlawful under ERISA.

retirement account. The effect on employers and employees alike can be devastating.[15]

2. Where plan amendments have reduced benefits, employees can be expected to sue to recoup the amount of the reduction. To take one common example, suppose that an employer recently amended its medical plan to convert from a so-called "first dollar" plan (where all medical expenses are covered in full) to a so-called "comprehensive" plan (where the employee must pay a deductible before any expenses are covered and then must make a "co-pay" until the "out-of-pocket maximum" is reached). According to the decision below, if the plan's amendment provision was the conventional reservation of authority, all employees would be entitled to recoup from the plan the deductibles and co-pays that they paid after the amendment.

Where benefits have been eliminated, employees can be expected to sue to recover the full benefits. This case is the perfect example: the employer amended the plan to eliminate medical coverage for retirees but the retirees won

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[15] Due to the vigorous and unforgiving enforcement posture of the Internal Revenue Service, disqualification is an immediate, not remote, possibility. Over the past few years, the Internal Revenue Service has been aggressively seeking out plans that have not been amended to comply with recent changes in the law and disqualifying them unless the sponsor agrees to pay very substantial penalties, in some cases ranging into the tens of millions of dollars. Administrative Policy Regarding Sanctions, announced March 26, 1991, Internal Revenue Manual 7(10)54; Employee Plans Closing Agreement Pilot Program ("CAP"), announced December 21, 1990, established as a permanent program on October 9, 1991, Internal Revenue Manual (11)10-80; Voluntary Compliance Resolution Program ("VCR"), Rev. Proc. 92-89, 1992-46 I.R.B. 27, October 28, 1992, extended by Rev. Proc. 93-36, 1993-29 I.R.B. 73. See also Rev. Proc. 94-16, 1994-5 I.R.B. 22 (Jan. 12, 1994).

As of March 31, 1994, the IRS had closed 820 cases under CAP involving 330,000 participants; about 170 cases are still pending. IRS has received 650 cases under VCR and 100 under "Standardized VCR" ("SVP") as of April 30, 1994. 21 *Pension & Benefits Reporter* (BNA) at 1091.

full payment of the benefits nonetheless. As noted above, elimination (or reduction) of medical benefits for retirees has been widespread in recent years, accelerating after the promulgation of FAS 106 in December 1990. Yet victory for retirees is virtually automatic under the decision below, thus retroactively denying employers all of the savings that they believed to have been achieved.

3. Ironically, plan amendments are just as likely to have *improved* the benefits of the plan, but plan administrators, as fiduciaries under ERISA, will be required to roll back the terms of the plan to where they stood before any post-ERISA amendments. As a result, it will be clear that many participants have been paid far more than they were entitled to, under the terms of the plan as now understood in retrospect.

Yet, for obvious reasons, plan administrators will find it impossible, as a practical matter, to recoup these overpayments of benefits. Any attempt to do so will produce lengthy litigation in federal court, likely involving fact-intensive questions of estoppel, for example.[16] In the end, employers likely will be required to absorb these additional costs, resulting in a "heads-I-win, tails-you-lose" double whammy for employers, already reeling under the escalating cost of health care.

4. Perhaps worst of all, however, the decision below will effectively require the plan administrators of virtually all affected plans to seek instructions in federal court as to what the terms of the plan are. As shown above, the plan administrator has a federal statutory duty to carry out the terms of the plan, but only insofar as those terms are consistent with ERISA. After the decision below, no plan administrator can be certain what those terms are (or have been since 1975).

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[16] Jurisdiction of such actions will lie exclusively in federal court under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1).

This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or capricious" standard of review. The validity of a plan amendment provision under ERISA section 402(b) is a question of law as to which the plan administrator receives no deference.

As a result, the plan administrator acts in peril of personal liability for any error in applying the decision below to the history of the plan since 1975. Under ERISA, fiduciary liability is personal, not a liability of the plan. And ERISA section 502(1), 29 U.S.C. § 1132(1), imposes an additional 20% penalty upon the fiduciary personally (unless waived or reduced by the Secretary of Labor).

In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to what the terms of the plan are (and have been since 1975). This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) ("A trustee who is in doubt as to the interpretation of the instruction can protect himself by obtaining instructions from the court.")

Needless to say, enmeshing the federal courts in deciding what the terms of most single-employer pension and welfare benefit plans have been over the past 19 years represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

Given the interstate reach of many employee benefit plans and the liberal venue and universal service of process provisions of ERISA, the problem cannot be contained in

the Third Circuit. While the decision below conflicts with decisions of the Fourth and Sixth Circuits (and probably the Seventh Circuit), as pointed out in the petition, many employee benefit plans cover participants in more than one circuit. All it takes, therefore, is one participant in the Third Circuit to institute a class action on behalf of all participants nationwide.[17] Plans all across the United States will be exposed to egregious forum-shopping if clever class-action counsel can identify even one employee or retiree residing in Pennsylvania, New Jersey, Delaware or the Virgin Islands—not a difficult task with respect to most companies of national stature.

In order to protect themselves against such forum-shopping, the administrators of such plans will be forced to launch pre-emptive strikes in one of the circuits that disagree with the Third. These pre-emptive strikes will take the form of an action for declaratory judgment by the plan administrator against the participants as a defendant class, seeking to settle the terms of the plan as including all amendments made pursuant to the conventional reservation of authority to amend. Such a wasteful, burdensome exercise cannot have been within the contemplation of the Congress that enacted ERISA.[18]

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[17] ERISA effectively permits an action to be brought in any district where the participant resides, on the ground the breach occurred there; this is all the more true for retirees, who may retire to any circuit regardless of where their former employer conducted business. ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2).

[18] Even if the employer is headquartered in the Third Circuit, the intelligent course for the plan administrator would be to find a participant residing in one of the circuits that disagree with the Third and file in that circuit for declaratory judgment against all participants as a class.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on employers, and the time has come to do so again—in a case with implications even more far-reaching and devastating than any previous ERISA decision of this Court.

Respectfully submitted,

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